IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.01.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C.(A) No.266 of 2001

The Commissioner of Income Tax
Trichy. .. Appellant

Vs.

S.Subramaniam .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench dated 15.2.1999 made in ITA No.1362/Mds/1991 for the assessment year 1986-87 against the order of the Commissioner of Income Tax, [Appeals], Madras 34, dated 22.2.1991 an made in IT Appeal NO.104/1989-90/Trichy against [831 S/1986-87 dt. 22.11.89 on the file of the Asst. Commissioner of Income Tax, Company Circle, Trichy].

For Appellant : Mr.T.Ravikumar
Junior Standing Counsel

For Respondent : Mr.R.Vijayaraghavan

J U D G M E N T

(Delivered by P.D.DINAKARAN, J.)

The above tax case appeal is directed against the order of the Income-tax Appellate Tribunal dated 15.2.1999 made in ITA No.1362/Mds/1991 for the assessment year 1986-87, raising the following substantial question of law:

" Whether on the facts and in the circumstances of the case, the Appellate Tribunal is right in law in cancelling the order under Section 155 of the Income-tax Act, 1961 ?"

2.1. The brief facts of the case are stated as hereunder:

The Revenue is the appellant. The issue raised in this appeal relates to the assessment year 1986-87. The assessee is a partner of the firm M/s.Hotel ARR. The original assessment on the return filed by the assessee for the said assessment year was completed on 13.10.1987 under section 143(1)(a) of the Act adopting share of loss from the firm as

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Rs.5,75,437/-. But, subsequently, the assessment was sought to be rectified under Section 155 of the Income-tax Act, 1961, by order dated 22.11.1989 adopting the share of loss as 'Nil' on the ground that the firm had filed its return belatedly and the same had been lodged. Aggrieved against the said order, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals) and it was contended by the assessee before the Commissioner that rectification under Section 155(1)(a) of the Act can be made pursuant to the assessment or re-assessment of the firm, but not in a case where the return of the firm had only been lodged. The Commissioner, by order dated 22.2.1991 allowed the appeal holding that as per Section 155 (1) of the Act, which gives limited jurisdiction, the assessment of a partner of the firm can be rectified only when it was found that on the assessment or re-assessment of the firm, the share of the partner has not been included in his assessment or if included, is incorrect and section 155 can be restricted to only when the assessment of the firm had been completed and not when return of the firm had been lodged, as a result of the belated filing and when admittedly in the instant case where there is no assessment of the firm M/s.Hotel ARR, no action can be taken on the return filed by it.

2.2. Aggrieved by the same, the Revenue went on appeal before the Income-tax Appellate Tribunal and the Tribunal, by order dated 15.2.1999, upheld the order of the Commissioner holding that the power to rectify under Section 155 of the Act cannot be resorted to in a case where there is no completed assessment and more so, in a case where the return of the firm was only lodged, as in the instant case. Hence, the present appeal by the Revenue raising the substantial question of law referred to above.

3. In this connection, it is apt to refer Section 155(1) of the Income-tax Act, 1961, which reads as follows:-

> 155. (1) - Where in respect of any completed assessment of a partner in a firm for the assessment year commencing on the 1st day of April, 1992, or any earlier assessment year, it is found -
>
> (a) on the assessment or reassessment of the firm, or
> (b) on any reduction, or enhancement made in the income of the firm under this section, section 154, section 250, section 254, section 260, section 262, section 263 or section 264, or
> (c) on any order passed under sub-section (4) of section 245D on the application made by the firm,
>
> that the share of the partner in the income of the firm has not been included in the assessment of the partner or, if included, is not correct, the Assessing Officer may amend the order of assessment of the partner with a view to the inclusion of the share in the assessment or the correction thereof, as the case may be; and the provisions of section 154 shall, so far as may be, apply thereto, the period of four years specified in sub-section (7) of that section being reckoned from the end of the financial year in which the final order was passed in the case of the firm."

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4. Section 155 authorises an amendment of an order of assessment where the assessment had earlier been completed. It is settled law that where there is no order of assessment under Section 143(3), it is impermissible to invoke jurisdiction under section 155. "Completed assessment" employed in section 155(1) means a positive act of completion which should be clearly distinguished from lapse of authority to assess on the expiry of the period of limitation prescribed. It cannot be held that on the lapse of the authority to assess on the expiry of the period of limitation, the provisional assessment became final and complete. Moreover, section 155 gives a limited jurisdiction to amend an order of assessment with a view to include the proper share in the assessment or correction thereof as may be found necessary as a consequence of the assessment or reassessment of the firm or any reduction or enhancement of the income thereof, vide HANSRAJ DHINGRA v. UNION OF INDIA (Cal.) [(1975) 98 I.T.R. 397].

5. Like in the case before the Calcutta High Court, where admittedly there was no order of assessment made under section 143(3), in the instant case, the original assessment of the assessee adopting share of loss was only made under Section 143(1)(a) and only after the filing of the return of the firm belatedly and when the same had been lodged, the assessment was sought to be rectified under Section 155 adopting share of loss from the firm as 'Nil'. The facts in the present case are identical to the facts before the Calcutta High Court in the case cited supra and hence, we are in full agreement with the views of the Calcutta High Court in the said case cited supra. Following the same, we hold that rectification of the order of the original assessment invoking section 155 of the Act is impermissible, when the assessment had not been completed under Section 143(3) and more particularly, when the return of the firm had only been lodged.

In view of the above, we answer the question of law in the affirmative, against the Revenue and in favour of the assessee. Accordingly, the tax case appeal is dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To:

1.The Assistant Registrar,
  Income Tax Appellate Tribunal
  Madras Bench "B", Besant Nagar,
  3rd Floor, Rajaji Bhavan,
  Chennai 90.
2.The Commissioner of Income
  Tax (Appeals), Chennai.
3.The Assistant Commissioner of
  Income Tax, Company Circle,
  Trichy.
4. The Commissioner of Income Ta,
Trichy.

+ 1 CC To Mr. N.Murali kumaan, Advocate SR NO.548

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